United States Court of Appeals

for the Second Circuit

APPENDIX

74-2285

2285

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
TOBIA SPINA,

Relator-Appellant,

-against-

ADAM McQUILLAN, Warden,

Respondent-Appellee.

Docket No. 74-2285

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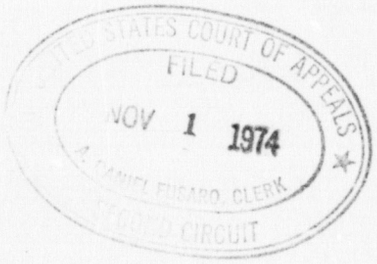
B/S

APPENDIX

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Relator-
Appellant TOBIA SPINA
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

MICHAEL YOUNG,
Of Counsel

A

Tenney, J.

CIVIL DOCKET

UNITED STATES DISTRICT COURT

PRO SE

Jury demand date:

73 Civ. 2765

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
UNITED STATES OF AMERICA EX REL, TOBIA SPINA VS. ADAM MCQUILLAN WARDEN QUEENS COUNTY HOUSE OF DETENTION.	For plaintiff: TOBIA SPINA. 1 Court Square, LI.C. N.Y. 11101 For defendant:

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DI
J.S. 5 mailed X	Clerk	1/8			
J.S. 6 mailed	Marshal				
Basis of Action: HABEAS CORPUS.	Docket fee				
	Witness fees				
Action arose at:	Depositions				

U.S.A. EXREL, TOBIA SPINA vs. ADAM MCQUILAN WARDEN ETC.

PRO SE

DATE	PROCEEDINGS	Date Order Judgment N
Jun21-73	Filed petition for writ of habeas corpus.	
Jun21-73	Filed rder permitting the pltff to proceed in forma pauperis without prepayment of fees, Wyatt. J.	
Aug 13-73	Filed petitioner's supplemental petition in support of writ of habeas corpus	
Aug 13-73	Filed respondent's affirmation in opposition to petition for habeas corpus relief.	
Sep 7-73	Filed petitioner's motion to suppress request for dismissal of writ of habeas corpus by District Attorney of New York County	
Sep 7-73	Filed notice of assignment of this action to Tenney, J.	
Nov 7-73	Filed MEMORANDUM OPINION#39980 Petition denied in all respects Tenney,J.	
Dec.20-73	Filed Petitioner Tobia Spina s Notice of Appeal from decision and order of U.S.D.C.S.D.NY(Tenney,D.J.)denying and dismissing petition on Nov.5,1973.(Mailed copy to Tobia Spina and Frank S. Hogan,District Atty,NY County on 1/3/73 by Pro Se Clerk)	
*Dec.17-73	Filed MEMORANDUM . Certificate of probabl13 cause is denied as Count feels there are no issues of fact or law upon which the Court of Appeals should rule.However,Court grants petitioner permission to proceed in forma pauperis.So Ordered.TENNEY,J.	
Jan 22-74	Filed Notice that rrcord on appeal has been certified & transmitted to USC of Appeals .2nd Circuit	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel. TOBIA SPINA,

Petitioner,

-against-

ADAM McQUILLAN, Warden, Queens County House of Detention,

Respondent.

Pro Se 73 Civ. 2765 (CHT)

MEMORANDUM

TENNEY, J.

Petitioner, Tobia Spina, is presently serving a one year sentence at the Queens County House of Detention, New York, having previously been convicted by the Supreme Court, New York County, of conspiracy in the fourth degree and of receiving unlawful gratuities. Proceeding pro se, he petitions this court for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241 et seq., on two grounds.[1/] First, petitioner claims that he was denied his right to a speedy trial. Second, petitioner alleges that his trial was prejudiced by adverse publicity during his trial. For the reasons cited hereinafter, the petition must be denied.

The record indicates that petitioner, a detective for the New York City Police Department, was indicted, together with Watkins T. Parry, on November 19, 1969 but that the trial did not commence until January 6, 1972, some 26 months later.

At that time, and until March 29, 1973, petitioner was free on his own recognizance. It appears that, until the commencement of the trial, petitioner's counsel made no demand for trial. Indeed, the numerous delays were either caused by petitioner's and/or Parry's counsel or were consented to by them. On the eve of trial, petitioner's attorney orally moved to dismiss the indictment because of delay in prosecution. He argued that because of the delay, petitioner would be severely prejudiced in that a "material" witness--Albert A. Seedman--had "disappeared". The trial court denied the motion and the trial proceeded. It should be noted that, in the course of the trial, Mr. Seedman was called as a character witness in behalf of petitioner's co-defendant, but petitioner's counsel took no part in the examination of that witness.

The twenty-six month delay raises the threshold question of whether petitioner was denied his right to a speedy trial. Under Barker v. Wingo, 407 U.S. 514, 530 (1972), however, the court is entitled to weigh the following additional factors before concluding that a defendant has been denied his sixth amendment right to a speedy trial: the reason for the delay, whether the defendant has in fact suffered any prejudice from the delay and whether the defendant asserted his right at any time before trial commenced. Id.

In view of the fact that petitioner never asserted his right to a speedy trial until the trial was about to begin and

in view of the fact that petitioner apparently suffered no prejudice--Seedman was never called to testify in petitioner's behalf and petitioner was free on his own recognizance during the entire period--his claim that his sixth amendment right was infringed is without merit.

The second argument that petitioner makes is that he was denied due process in that certain adverse publicity during the trial had a prejudicial effect upon the jury. While the trial was in progress, there was much publicity from the Knapp Commission hearings regarding corruption within the New York City Police Department. On one occasion, the media reported the arrest of several unnamed police officers who had allegedly received bribes in the amount of $5,000. Thereupon, petitioner's counsel moved for a mistrial on the ground that, because the petitioner and his codefendant had been charged with agreeing to accept, and with having accepted, bribes in that amount, petitioner was necessarily prejudiced. The trial court denied the motion.

The record fails to sustain petitioner's argument. As the trial court noted, the allegedly prejudicial publicity never mentioned either petitioner or his codefendant by name. Because petitioner never requested a voir dire of the jury to determine whether any of the jurors might be influenced by the publicity, there is no way of determining whether the publicity had any effect upon them. The failure of the trial judge to

poll and instruct the jury regarding prejudicial trial publicity did not constitute a denial of due process, particularly because the alleged publicity at petitioner's trial cannot be compared to the type of publicity condemned in such cases of Sheppard v. Maxwell, 384 U.S. 333 (1966). Havey v. Kropp, 458 F.2d 1054, 1057 (6th Cir. 1972).

For the reasons stated above, the petition is denied in all respects.

So ordered.

Dated: New York, New York
November 5, 1973

Charles D. Metz
U.S.D.J.

UNITED STATES OF AMERICA ex rel.
TOBIA SPINA,

Petitioner,

-against-

ADAM McQUILLAN, Warden, Queens County House of Detention,

Respondent.

Pro Se 73 Civ. 2765 (CHT)

FOOTNOTE

1/ Both grounds were argued before the Supreme Court, New York County and the Appellate Division, First Department. Petitioner's conviction was affirmed by the Appellate Division on January 4, 1973. On March 13, 1973, leave to appeal to the Court of Appeals was denied.

Certificate of Service

November 1, 1974

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.